Filed 7/23/19 P. v. Jimenez CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. OSCAR JIMENEZ, Defendant and Appellant.	H043629 (Santa Clara County Super. Ct. No. C1488374)

A jury found defendant Oscar Jimenez guilty of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)),[1] driving or taking a vehicle with a prior conviction (Veh. Code, § 10851, subd. (a); § 666.5), and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true allegations that defendant had committed the robbery and the driving or taking offense for the benefit of a gang (§ 186.22, subd. (b)(1)) and that he personally used a knife during the robbery (§ 12022, subd. (b)(1)). The trial court found true allegations that defendant had been convicted of a prior strike (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony (§ 667, subd. (a)), and that defendant had served prior prison terms (§ 667.5, subds. (a), (b)). Defendant was sentenced to 25 years and 4 months in prison.

[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

On appeal, defendant argues that: (1) the field showup used by police violated his due process rights, and trial counsel was ineffective for failing to move to exclude evidence of the identification; (2) the trial court prejudicially erred by allowing the admission of testimonial hearsay statements; (3) there was insufficient evidence to support the felony conviction for driving or taking because the prosecution failed to prove the value of the vehicle exceeded $950; (4) the trial court committed reversible instructional error by failing to specify that a felony conviction for driving or taking required a showing that the value of the vehicle exceeded $950; and (5) he is entitled to a remand to allow the trial court to exercise its discretion to strike the prior serious felony enhancement.

We find no merit in defendant's challenge to the field showup. However, we conclude that the trial court erred by admitting testimonial hearsay evidence and that the Attorney General has not shown beyond a reasonable doubt that the erroneously admitted evidence did not contribute to the jury's true findings on the gang enhancements and verdict on the substantive gang offense. Finally, we reject defendant's challenge to the driving or taking conviction. We reverse the judgment.

I. Factual Background

On July 15, 2014, at approximately 11:00 a.m., Jose Fernando Guevara Moreno was at his home on East Julian Street in San Jose when he heard his car being started. Moreno went to check on the car and saw it being driven away. Moreno had not given anyone permission to drive the car. The vehicle, a two-door Honda Civic, was reported stolen to San Jose Police.

Between noon and 1:00 p.m., Jordan Vasquez was walking on the sidewalk when a car pulled over next to him. Defendant and Enrique Sandoval got out of the car. They approached Vasquez and asked him if he "banged," which Vasquez took to mean that they were asking him if he was affiliated with a gang. Vasquez stated that he was not

affiliated with any gang. They then asked Vasquez to lift his shirt to check for gang-affiliated tattoos. Vasquez complied and showed he did not have any gang tattoos. Defendant and Sandoval then asked Vasquez for his cell phone. Defendant held a knife in his hand. Vasquez initially refused to give up his phone. Defendant told Vasquez to "[g]ive him the phone or I'll fucken stick you." Vasquez handed over the phone. Defendant and Sandoval took the phone and got into their car, speeding away at a high rate of speed and nearly hitting a bicyclist.

Vasquez went home and his father called 911. Vasquez, through his father, described defendant to 911 as an approximately 22-year-old bald Hispanic male, who was wearing blue shorts and no shirt and who had a three-dot tattoo under his left eye. Vasquez also described defendant as armed with a knife and described the car as a two-door silver Honda Civic or Accord. Vasquez described Sandoval as wearing a white tank top and jean shorts, with a tattoo on his cheek. These descriptions were broadcast to police.

San Jose Police Officer Eugene Gaines observed a Honda Civic exiting the freeway that matched the description of the vehicle used in the armed robbery. Sandoval was driving the car and defendant was in the passenger seat. He tried to follow the car; however, it began to rapidly weave in and out of lanes at a high rate of speed and Officer Gaines lost sight of the vehicle.

At approximately 1:12 p.m., officers found the vehicle unoccupied in an underground parking garage. Witnesses directed officers in the direction they had seen two men running from the car. Officers found defendant and Sandoval in a stairwell. Defendant was wearing blue shorts and was shirtless. Sandoval was wearing a white tank top and jean shorts.

Vasquez was driven to the underground garage to view defendant and Sandoval in a field showup. San Jose Police Officer Martin Miller admonished Vasquez that officers had found individuals matching Vasquez's description of the suspects but that they may

not be individuals who robbed Vasquez. Vasquez identified defendant and Sandoval as his assailants. Vasquez identified the vehicle in the garage as the one used by Sandoval and defendant. The vehicle was Moreno's stolen Honda Civic. Inside the car, police found Vasquez's cell phone, a knife, burglary tools, a flashlight, and two shirts.

At trial, Vasquez identified defendant and Sandoval as the individuals who robbed him. Vasquez noted that he was "pretty good with faces" and that he "never forget[s] a face." Vasquez testified that he was never told that he had to make a positive identification and that he was not influenced in any way to identify defendant or Sandoval.

II. Discussion

A. Pretrial Identification Procedure

Defendant challenges the field showup procedure, arguing that the showup procedure used in the underground parking garage was unduly suggestive and unnecessary under the circumstances. He concedes that trial counsel failed to object to the admission of the identification and thus he raises this issue for the first time on appeal, but contends that he is permitted to do so because it involves "only a question of law arising from facts that are undisputed or not open to controversy." In the alternative, if deemed forfeited, he contends that trial counsel was ineffective for failing to raise the issue in the trial court.

Defendant's trial counsel did not object to Vasquez's in-court identification or to his testimony that he had identified defendant during the field showup in the underground parking garage. Because of this, the claim has been forfeited. (*People v. Elliott* (2012) 53 Cal.4th 535, 585-586 ["[i]nsofar as defendant is asserting that unduly suggestive pretrial identification procedures tainted the courtroom identifications, so that the witnesses should not have been permitted to identify defendant in court, defendant has forfeited the claim by failing to make a timely objection or motion to exclude in the trial

court"]; *People v. Medina* (1995) 11 Cal.4th 694, 753 [defendant's failure to object to identification procedure as "unduly suggestive and unreliable" forfeited the claim].)

Defendant's attempt to raise the issue as one involving ineffective assistance of counsel is likewise unavailing because, in any event, the identification procedure used did not violate his due process rights. To establish a claim of ineffective assistance of counsel, a defendant must make a two-prong showing of deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." (*Id.* at p. 700.) The prejudice prong requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

A defendant challenging an identification procedure bears the burden of establishing (1) the procedure used was unduly suggestive and unnecessary, and, if so, (2) that the identification by the witness was not reliable under the totality of the circumstances, taking into account such factors as the witness's opportunity to view the perpetrator at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspects, the level of certainty the witness demonstrated at the showup, and the time between the crime and the showup. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412 (*Ochoa*).) The defendant must establish "unfairness as a demonstrable reality, not just speculation." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

Here, the record confirms that the procedure used was not unduly suggestive and unnecessary, and, that under the totality of the circumstances the identification was reliable. (*Ochoa*, *supra*, 19 Cal.4th at p. 412.) Defendant argues that the showup conducted in his case was "clearly suggestive" because it was done in the presence of uniformed officers, defendant was cuffed, officers said they had chased defendant before

arresting him, and they said that defendant matched the description of the suspect. However, defendant's complaints about the showup procedure ignore the reasons why showups are necessary in the first instance. "'An in-the-field showup . . . is generally an informal confrontation involving only the police, the victim and the suspect. One of its principal functions is a prompt determination of whether the correct person has been apprehended. [Citation.] Such knowledge is of overriding importance to law enforcement, the public and the criminal suspect himself. [Citation.]'" (*People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049 (*Rodriguez*).)

In the instant case, police were investigating an armed robbery. While fleeing the robbery, the perpetrators nearly hit a bicyclist, and police observed them weaving through traffic at high rates of speed. Officers found the vehicle unoccupied in an underground parking garage. Officers searched for the suspects and found defendant and Sandoval in a stairway. Police believed they may have apprehended the suspects and needed to confirm whether they had the perpetrators. Under the circumstances, it was necessary (and therefore not *unduly* suggestive) for police to quickly determine if they had indeed apprehended the actual perpetrators. (*Rodriguez*, *supra*, 196 Cal.App.3d at p. 1049 ["[i]t is well settled that 'weighing the respective individual and societal interests to be served,' the advantages of prompt identification or elimination of suspects through an in-field showup outweigh the potential prejudice of such a procedure to the suspect. [Citations.]"].)

Even assuming arguendo that the pretrial identification procedure was unduly suggestive, we nevertheless conclude that Vasquez's pretrial identification of defendant was reliable under the circumstances. (*Ochoa*, *supra*, 19 Cal.4th at p. 412.) Before the showup, Vasquez was admonished that while officers had apprehended two suspects, the individuals that officers found may not be the actual perpetrators. (*Rodriguez*, *supra*, 196 Cal.App.3d at p. 1049.) Additionally, Vasquez testified that the perpetrators were very close to him during the robbery. (*Ibid.*) Vasquez also testified that he was "pretty good

with faces" and "never forget[s] a face." Officers held the showup shortly after the robbery. Vasquez identified defendant "as soon as he saw [him]." Under the totality of the circumstances, defendant has not shown there was a substantial likelihood of misidentification.

Given the lack of any arguable basis on which to challenge the pretrial identification procedure, defendant's claim that counsel was ineffective for failing to seek exclusion of the pretrial identification evidence is unavailing. (*Strickland*, *supra*, 466 U.S. at pp. 687-688.)

B. Hearsay Evidence

Defendant contends that the trial court prejudicially erred in permitting the prosecution's gang expert to testify to case-specific testimonial hearsay over his Sixth Amendment and hearsay objections.

Section 186.22 proscribes the substantive offense of active participation in a criminal street gang, as set forth in subdivision (a), and includes enhancement provisions, which are found in subdivision (b). (*People v. Elizalde* (2015) 61 Cal.4th 523, 538-539.) The elements of the offense are: "First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.) The enhancement provisions apply when a felony is committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b).)

1. Procedural Background

Defendant moved in limine to preclude the gang expert's reliance on or reference to any testimonial hearsay statement, particularly those contained in police reports. Defendant contended that such statements were testimonial hearsay and their admission violated his Sixth Amendment rights of confrontation and cross examination. The court determined that such statements could be admitted as non-hearsay evidence, not offered for the truth of the statements but to show the basis of the expert's opinion.

Detective Matthew Santos testified at trial for the prosecution as its gang expert. He testified about the Sureno gang. He explained that the Surenos were a criminal street gang and that their rivals were the Nortenos. Varrio Pelogrosos Locos (VPL) was identified as a subset of the Surenos. Surenos are associated with the color blue; Nortenos are associated with the color red. Detective Santos also testified to the role of tattoos in the gang. He noted that a three-dot tattoo was common to Sureno gang members. He also described the practice of "checking," in which a Sureno will ask someone, "Do you bang?" Checking also involves looking for specific tattoos, colors, or clothing associated with a specific gang. Detective Santos explained that the practice of checking is a means of asserting control over a specific area.

Detective Santos testified that based on his expert opinion, defendant was an active Sureno gang member. In reaching this opinion, he reviewed photographs of defendant's numerous tattoos, including the three-dot tattoo near his right eye, the "peligrosos" tattoo on his chest, the "Varrio Peligrosos Locos" tattoo on his head, a "broken north star" tattoo also on his head, and a "VPL" tattoo on his back. Detective Santos also noted photographs of defendant's hand and leg, which included more three-dot tattoos and another "VPL" tattoo. The photographs were entered into evidence.

Additionally, Detective Santos based his opinion on a police report. In a police report prepared by Detective Humberto Rangel, Detective Rangel recounted that defendant stated that he was "down" with VPL, that he had been a member of VPL for

two years, and that he was "jumped" into the gang by three men. According to Detective Santos, these statements amounted to a "self-admission" by defendant that he was a Sureno gang member. Detective Santos also relied on two probation reports. The first report recounted a statement attributed to defendant during an altercation—that he shouted "VPL, puro sur"—which meant that he was a "pure southerner." Detective Santos described this statement as a "battle cry" used by Sureno gang members. In another probation report, defendant told the probation officer that he was a member of VPL. The report also described how defendant had worked with another Sureno gang member to assault a Norteno gang member. According to Detective Santos, this showed that defendant worked with other Sureno gang members from other parts of the city.

Detective Santos turned to discussing Sandoval and referenced a police report prepared by Officer Jaime Alfaro. In the report, Officer Alfaro recounted a conversation with Sandoval, in which Officer Alfaro asked Sandoval if he was a Sureno. Sandoval replied that he was a Sureno and that his neighborhood was "'VWST,'" which stood for a Sureno gang subset known as Varrio Williams Street. Officer Alfaro also asked Sandoval about the three-dot tattoo near his eye. Sandoval replied that he earned the tattoo because he was "jumped in" by five guys and that "he showed respect and was never punked." Detective Santos characterized these statements as self-admissions by Sandoval that he was a Sureno gang member.

Detective Santos was next asked about a police report prepared by Officer Joseph Sciarrillo. Officer Sciarrillo had asked Sandoval what the letter "D" stood for—Sandoval responded that it stood for "Demons or Demonios." According to Detective Santos, this was significant because VWST uses the demon as a symbol. The report also noted that Sandoval had been stopped with another person who told Officer Sciarrillo that he "was a Sureno from Poco Way." Sandoval told Officer Sciarrillo that Sandoval "'kicked it with other Surenos from varrios of Poco Way,'" which was a "well-known Sureno street

gang." Detective Santos explained that it was significant that Sandoval was associating with another Sureno gang member.

The prosecutor asked Detective Santos about a police report written by Officer Daniel Pfiefer. Detective Santos reported that Sandoval had a conversation with Officer Pfiefer, in which Officer Pfiefer asked Sandoval, in reference to VWST, "Are you Williams Street?" Sandoval replied, "Yes." When asked how long he had been part of VWST, Sandoval said "Two years." Detective Santos stated that this "self-admission" informed his opinion that Sandoval was a Sureno gang member.

Finally, Detective Santos was asked about a police report written by Officer Thomas Walias. In the report, Officer Walias reported that Sandoval told him that he was a "southerner" and that he "hangs out at Williams." Detective Santos explained that this was significant, because "[s]outherner basically means a Sureno street gang member."

Having reviewed these reports, Detective Santos opined that Sandoval was an "active member of the San Jose Sureno street gang Varrio Williams Street," consistent with the definition of a criminal street gang in section 186.22. In response to a hypothetical based on the facts of the instant case, Detective Santos testified that the armed robbery and driving or taking offense had been committed for the benefit of or in association with the Sureno gang.

2. Analysis

The confrontation clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 59 (*Crawford*).) This bar applies only to testimonial statements. (*Id.* at p. 53.) The admission of nontestimonial statements, while subject to state law hearsay rules, does not violate the confrontation clause. (*Ibid.*)

In *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the California Supreme Court held that a gang expert is generally barred from testifying to "case-specific facts about which he has no personal knowledge." (*Id.* at p. 676.) The court determined that a trier of fact must necessarily consider expert basis testimony for its truth in order to evaluate the expert's opinion, implicating the hearsay rule and the constitutional right of confrontation. (*Id.* at p. 684.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay . . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p. 686, fn. omitted.)

Thus, a gang expert cannot testify to case-specific facts asserted in hearsay statements unless such facts are within the expert's personal knowledge or independently supported by admissible evidence. (*Sanchez*, *supra*, 63 Cal.4th at pp. 676, 684-685.) Factual assertions are "case-specific" if they relate "to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) Federal constitutional issues arise if case-specific facts are presented in the form of testimonial hearsay. (*Id.* at pp. 680-681, 685.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*Id.* at p. 689.) Information contained in a police report is generally construed as testimonial hearsay because police reports "relate hearsay information gathered during an official investigation of a completed crime." (*Id.* at p. 694.)

Here, Detective Santos provided extensive testimony concerning Sandoval's prior involvement with law enforcement based on his review of probation reports and police reports. As to Sandoval, Detective Santos related numerous case-specific facts from police reports that were clearly prepared "primarily to memorialize facts relating to past

criminal activity, which could be used like trial testimony." (*Sanchez, supra,* 63 Cal.4th at p. 689.) For instance, Officer Sciarrillo's report was prepared after Sandoval was detained for a drug-related incident. Officer Pfiefer's report was prepared after Sandoval was observed yelling at another person and displaying gang signs. Officer Alfaro's report was also prepared after Sandoval was detained by police. Detective Santos cited these reports and the statements contained therein as "self-admission[s]" that Sandoval was a Sureno gang member. Accordingly, under *Sanchez*, we conclude that the admission of these portions of Detective Santos' testimony constituted case-specific testimonial hearsay and violated defendant's confrontation clause rights. (*Sanchez, supra,* 63 Cal.4th at pp. 694-695.)

3. Prejudice

The erroneous admission of testimonial hearsay is reviewed for prejudice under the standard described in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*Sanchez, supra,* 63 Cal.4th at pp. 670-671, 698.) The Attorney General must show, beyond a reasonable doubt, that the error did not contribute to the jury's verdict. (*Sanchez, supra,* 63 Cal.4th at p. 698.) The erroneous admission of nontestimonial hearsay is a state law error, which is assessed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818. (*Crawford, supra,* 541 U.S. at p. 68; *People v. Duarte* (2000) 24 Cal.4th 603, 618-619.) Where there is a combination of federal and state law hearsay errors, the reviewing court applies the *Chapman* standard. (*Sanchez, supra,* 63 Cal.4th at p. 698; accord, *People v. Martinez* (2018) 19 Cal.App.5th 853, 861 ["Because the instant case involves a mix of testimonial and nontestimonial hearsay, we will apply the federal standard"].)

Given that the challenged testimony involved federal hearsay errors, we apply the *Chapman* standard. As noted, *Chapman* requires the Attorney General to show beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Pearson* (2013) 56 Cal.4th 393, 463.) "'"To say that an error did not contribute to the ensuing

verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." [Citation.] Thus, the focus is on what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error." [Citations.]' [Citations.]" (*Ibid.*)

Turning to the gang offense, we have no difficulty concluding that the inadmissible evidence was prejudicial. A conviction under section 186.22, subdivision (a) requires that defendant "acted *in concert* with other gang members in committing a felony . . . ." (*People v. Rodriguez*, *supra*, 55 Cal.4th at pp. 1138-1139.) Thus, the commission of a felony by *at least two members* of the same gang is an element of the offense. (*Ibid.*) The trial court emphasized this fact in its jury instructions. The prosecution emphasized during closing argument that Sandoval was "an active member of the Sureno criminal street gang" based on facts taken from police reports and recited by Detective Santos during his testimony. Simply put, most of the evidence establishing that Sandoval was an active Sureno gang member was based on inadmissible testimonial hearsay evidence. That evidence, in turn, made it possible to find that defendant had acted in concert with another gang member in the commission of a felony. Accordingly, the error was not harmless beyond a reasonable doubt.

Turning to the gang enhancements, we also conclude that the Attorney General has not shown that the error was harmless beyond a reasonable doubt. The Attorney General maintains that any error was harmless beyond a reasonable doubt because "[s]trong evidence apart from the challenged testimony established the truth of the gang enhancement allegation." This position, however, misapprehends the nature of our review. Our standard of review requires us to determine whether the inadmissible evidence influenced the jury's determinations, not whether the admissible evidence was potentially sufficient to support Detective Santos' opinions. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 65 ["The question under *Chapman* is not whether the expert relied in

significant part on the inadmissible evidence; the question is whether the admission of that evidence contributed to the verdict."].) "The test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the [verdicts] in this case. If such a possibility exists, reversal is required." (*People v. Lewis* (2006) 139 Cal.App.4th 874, 887; accord, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-280; *People v. Pearson*, *supra*, 56 Cal.4th at p. 463.)

Here, large portions of Detective Santos' challenged testimony were based directly on police reports that related statements made by Sandoval, many of which were repeated verbatim to the jury. The testimony did not fall within a hearsay exception, and it was both case-specific and testimonial. As we explained above, the Attorney General's burden is to show "beyond a reasonable doubt that the error complained of *did not contribute* to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at p. 24, italics added.) Although the testimony in question largely focused on Sandoval and not defendant, we are not convinced it "did not contribute" to the jury's true findings as to the gang enhancements. (*Ibid.*)

To prove the enhancements under section 186.22, subdivision (b), the prosecution had to show that a felony was committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b).) In arguing for true findings on the gang enhancements, the prosecutor noted, with respect to specific intent, the following: "And did they have the specific intent? What does that mean? That means did two gang members commit a crime together. Did one gang member commit a crime with someone else that wasn't a gang member? Or did that -- did a gang member commit a crime and that crime benefited the gang?" In concluding his argument, the prosecutor emphasized: "I told you from the beginning this is a gang case.

This a gang case because [defendant] is a gang member. Enrique Sandoval is a gang member. They are active gang members."

Thus, with respect to the gang enhancements, central to the prosecution's argument to the jury was the notion that Sandoval was a gang member. This, in turn, had been largely established by Detective Santos, who related and relied on inadmissible testimonial hearsay to establish Sandoval's status as a gang member. Based on this record, we cannot conclude beyond a reasonable doubt that the inadmissible evidence did not play a role in the jury's decision on the gang enhancements, especially where the prosecutor invited the jury to rely on Sandoval's status as a gang member to justify true findings on the gang enhancements. (*Chapman*, *supra*, 386 U.S. at p. 24.)

C. Proposition 47 and Vehicle Code section 10851

Defendant argues that the evidence was insufficient to support his felony conviction for driving or taking a vehicle because the prosecution failed to establish the value of the car. He claims that the prosecution made no attempt to establish that the value of the car exceeded $950 to qualify the offense as a felony and that therefore, this court should find that the vehicle offense was a misdemeanor.

1. Procedural Background

In March 2016, the trial court instructed the jury, as to the Vehicle Code section 10851 offense, as follows: "To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant took or drove someone else's vehicle without the owner's consent; and, two, when the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time. A taking requires that the vehicle be moved for any distance no matter how small."

During closing arguments, the prosecutor emphasized that Sandoval and defendant "were both in the car. They used the car to stop. They used the car to check Jordan Vasquez. They used that car to escape from the site of the robbery. They used the car to

evade police officers when they were trying to stop [defendant and Sandoval]." The prosecutor continued: "They are both liable for that crime of taking that car, of using that car. You heard from Mr. Guevara. You heard from his son. Neither of them had permission to use that car."

2. Analysis

On November 4, 2014, California voters approved Proposition 47, and it became effective the next day on November 5, 2014.[2] (§ 1170.18.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People* v. *Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Pursuant to section 490.2, subdivision (a), "Proposition 47 reclassified a variety of grand theft crimes to petty theft offenses when the value of the money, labor, real or personal property taken did not exceed $950." (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 854 (*Gutierrez*).) "Following passage of Proposition 47, Courts of Appeal disagreed whether [section 490.2] applied to vehicle theft under Vehicle Code section 10851 . . . ." (*Ibid.*) In *People v. Page*, the California Supreme Court resolved the issue, holding that "[b]y its terms, Proposition 47's new petty theft provision, section 490.2, covers *the theft form* of the Vehicle Code section 10851 offense." (*People v. Page* (2017) 3 Cal.5th 1175, 1183 (*Page*), italics added.) Thus, felony vehicle *theft* under Vehicle Code section 10851 requires a showing that the vehicle value exceeds $950. (*Page*, at p. 1183.)

However, Vehicle Code section 10851 covers not only theft offenses, but also *nontheft uses* of a vehicle. (*Page, supra*, 3 Cal.5th at p. 1182.) It "punishes not only

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[2] Because defendant's trial and sentencing were held after the measure's effective date, the "ameliorative provisions of Proposition 47" apply directly to defendant's case "regardless of whether the alleged offense occurred before or after that date." (*People v. Lara* (2019) 6 Cal.5th 1128, 1135.)

taking a vehicle, but also driving it without the owner's consent, and 'with intent *either* to permanently *or temporarily* deprive the owner thereof of his or her title to or possession of the vehicle, *whether with or without intent to steal the vehicle*.' [Citation.]" (*Ibid.*) "Theft, in contrast, requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its possession. [Citations.]" (*Ibid.*) "A person can violate [Vehicle Code] section 10851[, subdivision] (a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) Only the theft form of a Vehicle Code section 10851 offense requires a showing that the value of the vehicle exceeded $950; the nontheft use form of the offense does not require any showing of the value of the vehicle. (*Page*, *supra*, 3 Cal.5th at p. 1182.) Because there was evidence that defendant committed the nontheft use form of the offense, the prosecution's failure to show the value of the vehicle does not mean that the evidence is insufficient to support the conviction.[3]

The error in this case was that the jury instructions failed to differentiate between the theft and nontheft versions of Vehicle Code section 10851. The trial court's instructions "allowed the jury to convict [defendant] of [the theft form of] a felony violation of [Vehicle Code] section 10851" in the absence of proof of the value of the vehicle. (*Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.) This was "a legally incorrect theory." (*Ibid.*) The instructions also allowed the jury to convict defendant "for a nontheft taking or driving offense—a legally correct [theory]." (*Ibid.*)

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[3] Defendant puts misplaced reliance on *In re D.N.* (2018) 19 Cal.App.5th 898 (*D.N.*). That case did not involve a jury trial, and therefore did not involve instructional issues. (*Id.* at p. 900.) Nor is there any indication in *D.N.* that the evidence permitted the trier of fact to convict for the nontheft version of a Vehicle Code section 10851 offense. (*D.N.*, at pp. 900-902.)

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu* (2014) 59 Cal.4th 155, 167; accord *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The question before us is whether the record in this case establishes that the jury necessarily based its verdict on the nontheft form. Although the Attorney General concedes that reversal is required, we do not accept this concession. On this record, it is inconceivable that the jury could have found that defendant was liable for taking the vehicle without also finding that he was liable for driving it. The evidence that defendant took the car was based entirely on his posttheft use of the car. No one saw him take the car. He and Sandoval were seen using the car after it had been stolen. The jury could not possibly have found that defendant took the car without also finding that he used it after its taking. (Cf. *Garza*, *supra*, 35 Cal.4th 866, 882 [improbable that properly instructed jury would have found defendant guilty of violating Vehicle Code section 10851 by taking the car rather than by posttheft driving of the car where evidence showed that defendant was driving car that had been stolen six days earlier].) Under these circumstances, the trial court's error was harmless beyond a reasonable doubt because we can say with certainty that the jury could only have found either solely a posttheft use or both a posttheft use and a theft. The jury could not have concluded on the evidence before it in this case that defendant took the car but did not use it.

D. Senate Bill No. 1393

While this appeal was pending, the Governor signed Senate Bill No. 1393, which amended section 667, subdivision (a), and section 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony enhancement. (Stats. 2018, ch. 1013, §§ 1-2.) Under the version of the statute in effect when defendant was sentenced, the court was required to impose a five-year consecutive term for "[a]ny

person convicted of a serious felony who previously has been convicted of a serious felony . . . ." (§ 667, subd. (a).) The court had no discretion to "strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).)

We need not consider defendant's argument that he is entitled to remand for resentencing because he will necessarily be resentenced due to our disposition of this appeal.

E. Mandatory Fees and Due Process

Citing *People v. Duenas* (2019) 30 Cal.App.5th 1157, defendant argues that the trial court erred by imposing certain fees and fines "without the requisite hearing and finding as to [defendant's] ability to pay," in violation of his due process and equal protection rights. Because defendant will necessarily be resentenced, we need not consider this issue.

III. Disposition

The judgment is reversed. The matter is remanded with directions to allow the prosecution to elect whether to retry the active participation count and the gang enhancement allegations.

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Mihara, J.

WE CONCUR:

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Greenwood, P. J.

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Elia, J.

People v. Jimenez
H043629